No. 14,843

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

PRELIMINARY STATEMENT.

Appellees moved to dismiss this appeal because appellants have failed to establish the necessary amount in controversy conferring jurisdiction on this Court. The motion to dismiss, as well as the merits of the appeal were argued on January 12, 1956.

STATUTORY PROVISION.

The statute conferring jurisdiction on this Court to review final judgments of the Supreme Court of Hawaii provides:

> The courts of appeals for the First and the Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs. June 25, 1948, c. 646, 62 Stat. 929 (28 U.S.C. 1293.)

QUESTIONS PRESENTED.

Did the original petition for writ of prohibition filed in the Supreme Court of Hawaii to stay the circuit judge in a separate court from proceeding in a case before him on the ground of disqualification involve any "value in controversy" to support this Court's jurisdiction on appeal?

Do the assertions of questions arising under the Constitution and laws of the United States, made for the first time in this Court and based upon an unsupported claim that the circuit judge is pecuniarily interested in the issue of the case before him, raise substantial federal questions to support the jurisdiction of this Court on appeal?

We submit that both questions should be answered in the negative.

ARGUMENT.

I. NO AMOUNT OF $5,000 OR ANY OTHER SUM OF MONEY IS INVOLVED IN THIS APPEAL.

Appellants apparently concede that the prohibition proceeding itself does not involve a controversy over rights which can be measured in money. Nor could they assert otherwise. How evaluate their alleged right to have a judge other than Judge McGregor appoint trustees of the Farrington Estate? The leading case of *Barry v. Mercein,* 15 U.S. (5 How.) 118 (1846), involved a petition for writ of habeas corpus whereby petitioner sought control of his daughter then in the custody of his estranged wife. The Act of 1789, 1 Stat. 84, c. 20, Sec. 22, permitted the Supreme Court to review final judgments of the circuit courts when the matter in dispute exceeded $2,000. Chief Justice Taney pointed out that the Supreme Court had only such appellate jurisdiction as was conferred upon it by act of Congress. Construing the act, he held that

> The words of the Act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no

> words in the law which, by any just interpretation, can be held to extend the appellate jurisdiction beyond these limits, and authorize us to take cognizance of cases to which no test of money value can be applied. (p. 120).

The claim for custody was incapable of being reduced to any pecuniary standard and the writ of error was dismissed.

This Court reached the same result in *Sumi v. Young,* 83 F. 2d 752 (9th Cir. 1936), aff'd. 300 U.S. 251 (1937), involving an appeal from the United States District Court of Alaska.

Where the Supreme Court of the Territory of Montana issued a writ of mandamus commanding the governor and others to recanvass votes cast for the change of location of the territorial capitol, an appeal was dismissed because the matter in dispute was not "money, or some right the value of which in money can be calculated and ascertained."

Potts v. Chumasero, 92 U.S. (2 Otto) 358.

Accord:

First National Bank of Youngstown v. Hughes, 106 U.S. 523 (1882). (Injunction against production of corporate records. Alleged damage to business too speculative.)

In re Red Cross Line, 277 Fed. 853 (S.D. N.Y. 1921). (Action for specific performance of arbitration does not draw jurisdictional amount from claim to be arbitrated. Amount involved nominal.)

Carroll v. Somervell, 116 F. 2d 918 (2d Cir. 1941). (Matters not susceptible of pecuniary valuation arising out of alleged wrongful discharge.)

Confronted with the jurisdictional deficiency, appellants have sought to look beyond the present case to find some way to stay in court. They ask the Court to look to the circuit court case still pending before Judge McGregor (the one that came to a halt when the petition for writ of prohibition was filed, and again upon the filing of this appeal) to find the requisite value in controversy. By tortuous reasoning, they argue that the Hawaii Supreme Court had jurisdiction to issue the writ and that writs of prohibition may be employed as an auxiliary process to give full effect to existing appellate authority, citing *Minnesota & Ontario Paper Co. v. Molyneaux,* 70 F. 2d 545 (8th Cir. 1934) (Appellants' Memorandum p. 4). The gulf between territorial and federal jurisdiction vanishes as appellants argue that the test of the jurisdiction here is whether the Court would have jurisdiction over the circuit court case if it were appealed to the Supreme Court of Hawaii and a further appeal were taken from a final judgment in that court (Memo. p. 5).

This extraordinary maneuver of logic is accomplished by analogy. The prohibition proceeding, it is argued, may be deemed "ancillary" to the circuit court action, since the writ would be in aid of appellate jurisdiction; this being so, the "ancillary"

proceeding may draw its federal jurisdiction requirements from the circuit court case, on the analogy of the well-established ancillary-proceeding doctrine in the federal courts.

In reaching this conclusion, appellants overlook the fact that the instant case comes to the threshold of federal jurisdiction for the first time on this appeal. The circuit court case is not within the cognizance of this court at the present time, nor will it be until all territorial trial and appellate proceedings are completed.

Section 1293, *supra,* requires that the value in controversy exceeds $5,000. As Justice Stone said, in *Healy v. Ratta,* 292 U.S. 263 (1934), construing a substantially similar statute:

> The policy of the statute calls for its strict construction . . . Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. (p. 270).

The "value in controversy" has reference "to the matter which is directly in dispute in the particular cause in which the judgment or decrees sought to be reviewed has been rendered . . ."

> *Town of Elgin v. Marshall,* 106 U.S. 578, 579-80 (1882).

In the present case, the matter directly in dispute is the original petition for writ of prohibition on the ground of disqualification, and not the circuit court case.

The conclusion of appellants' analogical argument, is that the present action is ancillary to the circuit court action. It can support the jurisdiction of this Court on appeal because the primary action, although not in a federal court, can supply the missing jurisdictional requirements. The present case affords the final judgment required by Section 1293. The circuit court case provides the jurisdictional amount. Instead of the so-called ancillary action partaking of the established jurisdiction of the primary action, appellants would have the ancillary action originate federal jurisdiction while its primary action remains outside federal power.

The analogy grows more misshapen as the federal cases relating to ancillary jurisdiction are examined. The petition for writ of prohibition is not ancillary to the circuit court case in the sense used in the field of federal jurisdiction. To be ancillary in that sense, the controversy must deal with property or assets actually or constructively in the court's possession or control. *Fulton National Bank of Atlanta v. Hozier,* 267 U.S. 276 (1925). Obviously, the petition for the writ does not purport to deal with any property in the control of the circuit court. Furthermore, federal jurisdiction must have been established in the principal suit, and the ancillary action must be brought in the same court. An action in one federal district court will not be deemed ancillary to a principal action pending in another district.[1]

Raphael v. Trask, 194 U.S. 272 (1904).

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[1]There are certain exceptions with respect to receiverships and bankruptcies not here relevant.

See also:

Sullivan v. Swain, 96 Fed. 259 (S.D. Cal. 1899);

U.S. ex rel. Lambert v. Pedarre, 262 Fed. 839 (E.D. La. 1920);

Applegate v. Applegate, 39 F. Supp. 887 (E.D. Va. 1941).

Where an attempt was made to support federal jurisdiction in an ancillary action by jurisdictional facts drawn from the primary action pending in a state court, Justice Brandeis held in *Mitchell v. Maurer,* 293 U.S. 237 (1934), that

> where primary receivers appointed by a state court bring a suit for the appointment of ancillary receivers in the federal court * * * Obviously such an application is not ancillary to any proceedings in any federal court. It is an independent, original bill. Being such, it cannot be sustained when diversity of citizenship does not exist and no other ground of federal jurisdiction is shown. (pp. 243-44.)

This case bears a close relationship to the present one because it exemplifies the ancillary action seeking to support federal jurisdiction from a primary action, outside the scope of federal power.

In *Alesna v. Rice,* 172 F. 2d 176 (9th Cir. 1949), this Court held that the Hawaiian Organic Act (48 U.S.C. Sections 642, 645) places the courts of Hawaii in the same position in relation to the federal judicial system as state courts. It follows from *Mitchell v. Maurer, supra,* therefore, that appellants may not sustain the appellate jurisdiction of this

court by reference to a separate case pending in the Hawaiian circuit court.

In any event, reference to the circuit court proceeding would not remedy the deficiency of jurisdictional amount in this appeal. Appellants argue that the circuit judge must decide preliminary questions relating to interests in the trust estate before he can appoint trustees. These issues, it is said, will be concluded by the decree and hence the value in controversy includes the value of the property rights affected by the decision on such preliminary issues. But the determination of these issues is collateral to the appointment of trustees, which is the relief sought, and is necessary only to decide the applicability of Section 12572, Revised Laws of Hawaii 1945, to the appointment.[2]

Although a judgment on the questions relating to the interests of the parties in the trust might be res judicata in any subsequent proceeding, appellants may not use the value of those property interests to compute the value in controversy.

Thus, in *The Jesse Williamson, Jr.,* 108 U.S. 305 (1882), an admiralty action in rem, the fact that libellant might have a personal judgment against the owners for a substantial sum which would be conclusive upon them did not establish the requisite jurisdictional amount where the value of the vessel which was the subject of the action was stipulated to be less than the sum required to establish juris-

[2]See Brief for Appellees, pp. 2-3 and Appendix I.

diction so that final judgment would be for less than the required amount.

And in *New Jersey Zinc Co. v. Trotter,* 108 U.S. 564 (1883), an appeal in a trespass action for less than the jurisdictional amount was dismissed despite the fact that title to land having a value far in excess of the required sum was actually litigated and the judgment would be conclusive on the question of title.

In the circuit court case, the only matter actually in dispute is the identity of successor trustees. The court has already decided what parties have vested interests in the estate. This was necessary to determine the procedure for appointment of trustees. This determination will be conclusive on all parties as an estoppel by judgment except, of course, for appellants' right to appeal to the Supreme Court of Hawaii. Nevertheless, appellants would not be entitled to use the value of the rights thus decided in seeking to establish this Court's jurisdiction, even if they were permitted to refer to the territorial court as a fount of federal jurisdiction. *Town of Elgin v. Marshall,* 106 U.S. 578 (1882).

Commissions of prospective trustees cannot be used to support federal jurisdiction. Appellants claim the rights to name the trustees and to prevent appellees' nominees from being appointed. The commissions to be paid the trustees are in no way drawn into controversy. The asserted rights of appellants in the circuit court case have no measure in money; they do not have the pecuniary value to support jurisdiction. *Barry v. Mercein, supra.*

In summary, we submit that the proceeding for writ of prohibition does not involve a controversy over pecuniary value sufficient to support this appeal; that jurisdictional facts cannot be borrowed from the proceeding still pending in the territorial circuit court; and that the circuit court proceedings themselves would not permit appellants to cross the jurisdictional boundaries set by Section 1293 for appeal to this Court.

II. THIS APPEAL POSES NO SUBSTANTIAL QUESTION ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

The motion for disqualification filed by appellants in the circuit court stated in part:

> The grounds for this motion are that the Honorable Calvin C. McGregor is disqualified under Section 9573 of the Revised Laws of Hawaii, 1945 . . . (R. 10-a).

The petition for writ of prohibition asserted that the

> Circuit Judge is disqualified as a matter of law under said section 9573 from proceeding further in said Civil No. 139, as more particularly appears from said affidavit. (R. 7).

The opinion of the Supreme Court of Hawaii dealt solely with the construction of Section 9573, the territorial statute, and its application to the petition before the court (R. 11-28).

The petition for rehearing in the Supreme Court of Hawaii (R. 39-45) raised the question of the applicability of Section 9603, R.L.H. 1945, in the light of what appellants deemed a violation of the Canons of Judicial Ethics by the circuit judge. Although the petition for rehearing quotes at length from a United States Supreme Court opinion dealing with due process in a criminal case (R. 41), it raised no question of deprivation of any constitutional rights. Nor did it raise any question of disqualification under Section 84 of the Hawaiian Organic Act, although it mentions pecuniary interest in connection with the court's power of general superintendence (R. 43). In its decision denying the petition for rehearing, the court pointed out that the petition "presents no new matter that has not been previously considered by the court" (R. 48). The court ruled that Section 9603 had no bearing on the case.

Appellants raised the question of disqualification under Section 84 of the Organic Act for the first time in their Statement of Points on Appeal (R. 165). No constitutional question was raised. In fact, appellants asserted that a constitutional question is involved for the first time in their Memorandum in Opposition to the Motion to Dismiss, pp. 15-18.

The court of appeals of the first circuit dismissed the appeal in *Ramos v. Leahy,* 111 F. 2d 955 (1st Cir. 1940) under much the same circumstances. The governor of Puerto Rico removed the mayor of Manati under territorial law. The mayor lost his appeal to the Supreme Court of Puerto Rico and

his motion for consideration was denied without opinion. He then appealed to the court of appeals, asserting for the first time that he had been denied due process of law and that his removal violated the Puerto Rican Organic Act. The court in a per curiam opinion pointed out that the questions had not been presented to the lower court, and dismissed the appeal.

> It is not enough that a federal question be 'lurking in the record.' (p. 956.)

Indeed, appellants are hard put to find even a lurking federal question. They refer to matters which transpired after the entry of final judgment and seek to draw an inference of lack of due process (Memorandum in Opposition to Motion to Dismiss, p. 15). Appellees' motion to strike these portions of the record were denied on technical grounds, but not without a vigorous dissent by Justice Rice pointing out that these matters

> were not before or a part of the record of this supreme court or given consideration by us when our rulings were made which, respectively denied the petition for writ of prohibition herein and for a rehearing thereof . . . (Brief for Appellees, Appendix III, pp. vii-viii).

Even assuming error in these subsequent proceedings, they cannot be made to support a constitutional question on the appeal from the judgment of the Supreme Court rendered before they took place. And certainly the decision and judgment of the Supreme Court itself construing Section 9573, R.L.H. 1945,

and denying the writ of prohibition on the ground that the affidavit of disqualification was insufficient, is not a basis for a claim of lack of due process. That court took jurisdiction, reviewed the affidavit of disqualification in the light of the territorial statute, and construing the latter, denied the writ because the affidavit was insufficient. There can be no deprivation of the constitutional right to a fair trial by virtue of judicial disqualification where said disqualification has been found not to exist.

In dwelling upon *Tumey v. Ohio,* 273 U.S. 519 (1926), in their memorandum, appellants are engaging in another farfetched analogy. That case involved an Ohio procedure whereby the town mayor would hear prohibition law violations and would be compensated out of fines and costs collected from convicted violators. It holds that a defendant in a criminal case suffers a deprivation of due process of law where the judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." This salutary principle is immaterial to the present case. The circuit judge in the trial court has no interest, direct or indirect, pecuniary or other, in the outcome of the Farrington Estate controversy, and the affidavit of disqualification alleged none.

The argument now made is that the circuit judge if he favors Mrs. Farrington as delegate to Congress, will be increasing his chances of appointment to the federal bench. If he is so appointed, his salary will be increased. Even in appellants' view, the alleged

pecuniary interest of the judge is not in the issue of the case. It is in the relationship of the judge and the litigant. This relationship has been held by the Hawaiian Supreme Court to be not disqualifying under the Hawaii disqualification statute. As Chief Justice Taft said in the *Tumey* case, *supra:*

> All questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative policy. (273 U.S. p. 523).

The alleged question arising under Section 84 of the Organic Act also hinges upon a finding of direct pecuniary interest on the part of the judge in the issue before him. We submit no such interest has been shown. Appellants use a misleading footnote in their memorandum (Memorandum in Opposition to Motion to Dismiss, p. 19, fn. 1) claiming that the dissenting judge in the court below found such a disqualifying pecuniary interest and therefore the assertion of federal question is more than "colorable." However, a careful examination of the dissenting opinion (R. 29-38) reveals that the judge did not even mention Section 84 as a ground of disqualification under the facts of this case. In *Carey v. Discount Corporation,* 35 Hawaii 786 (1941), the court construed disqualification under Section 84 of the Hawaiian Organic Act to depend "upon facts capable of being precisely averred and proved, and thus put in issue and tried." Appellants have made no precise averment of the judge's pecuniary interest in the

issue of the case. The suggestions made initially in this Court in the effort to support federal jurisdiction raise not substantial federal question and should not obstruct the dismissal of the appeal for want of jurisdiction.

CONCLUSION.

The jurisdiction of this Court on appeal is clearly defined by statute. That statute should be strictly construed. Appellants have the burden of establishing and sustaining the jurisdiction of this Court. They must show either that the case involves a value in controversy in excess of $5,000, or a substantial question under the Constitution or laws of the United States. They have shown neither, and the motion to dismiss should be granted.

Dated, Honolulu, Hawaii,
February 10, 1956.

Respectfully submitted,
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